

HHS ITEM #1
June 21, 2010

Worksession

MEMORANDUM

June 18, 2010

TO: Health and Human Services Committee

FROM: Amanda Mihill, Legislative Analyst *A. Mihill*

SUBJECT: **Worksession:** Executive Regulation 7-10, Eating and Drinking Establishments – Nutritional Labeling

Background

On June 15, the Council received proposed Executive Regulation 7-10, Eating and Drinking Establishments – Nutritional Labeling (©6-14). ER 7-10 would implement Council Resolution 16-1194 and Bill 19-07, codified at §15-15A, Eating and Drinking Establishments – Nutrition Labeling, which the Council adopted on November 17, 2009. Resolution 16-1194 and Bill 19-07 require that calories and other nutritional information be provided at restaurant chains with 20 or more locations nationwide.

Under Method 2, the Council has 60 days to act on the regulation or extend time for Council action. The Council can approve, disapprove, or ask the Executive to amend it. The Council cannot amend the regulation. ER 7-10 was advertised in the May 2010 issue of the *Montgomery County Register*. The fiscal impact statement estimates that ER 7-10 would have a minimal fiscal impact (©15). A draft resolution is on ©37. Council staff has highlighted 2 issues for Committee discussion below.

Issues for Committee Discussion

1. Does federal law preempt ER 7-10? During the comment period, the Executive received comments arguing that the recently enacted Patient Protection and Affordable Care Act preempts County law and ER 7-10. Federal law preempts state and local governments from enforcing labeling requirements that are different from the federal law. Committee members may recall that when the Council considered Bill 19-07, the Council was careful to closely mirror federal law. The County Attorney's Office concluded that County law and the ER are consistent with and not preempted by federal law, though changes to either may be necessary once federal regulations are promulgated (©1). (Federal law requires initial regulations to be proposed 1 year after health care reform became law (i.e., March 23, 2011)). Council staff concurs.

2. Should enforcement of the nutrition labeling requirement be delayed? During the comment period, the Executive received several comments requesting that the County delay the implementation date of the nutrition labeling requirement. The Restaurant Association of Maryland, for instance, requested at least a 60 day delay (©20). A representative of Bertucci's posed several delay alternatives ranging from not imposing fines until federal law is implemented to a 1-year grace period (©27).

In response to these concerns, the Executive has proposed the following implementation schedule: During July, the Department of Health and Human Services would notify restaurants of the County's nutrition labeling requirement and require restaurants to submit implementation plans to the Department by September 15 indicating when restaurants would comply. Compliance would be mandatory no later than January 1, 2011.¹ In the Executive's view, this schedule will allow restaurants with pre-scheduled menu printing cycles to incorporate nutritional labeling without incurring additional expense for out-of-cycle menu printings.

Bill 19-07 requires compliance by July 1, 2010, which is less than 2 weeks away. Because there are no final regulations at this point, Council staff believes that it is reasonable to delay implementation for a time. Committee members may wish to discuss whether the Executive's proposed implementation schedule is appropriate or whether a shortened time frame (such as 60 days as the Restaurant Association of Maryland suggested) is more acceptable. If Committee members wish to delay the implementation date of Bill 19-07, Council staff will draft the appropriate legislation.

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¹ In the Executive's transmittal memorandum, the implementation date is identified as January 1, 2010. Executive staff indicate that this is a misprint and that restaurants must comply by January 1, 2011.



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OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850Isiah Leggett
County Executive

MEMORANDUM

June 15, 2010

TO: Nancy Floreen, President
County CouncilFROM: Isiah Leggett
County ExecutiveSUBJECT: Executive Regulation 7-10 – Eating and Drinking Establishments - METHOD 2
Nutrition Labeling

2010 JUN 16 AM 8:45

RECEIVED
MONTGOMERY COUNTY
COUNCIL

I am submitting for Council's approval Executive Regulation 7-10 to implement Resolution 16-1194 and Bill 19-07, Eating and Drinking Establishments-Nutrition Labeling, both adopted November 17, 2009, which require that calories and other nutritional information be posted on menus and menu boards of restaurant chains with 20 or more outlets nationwide. I am also submitting public comments received on the proposed regulation and a fiscal impact statement. Key issues related to the development of this proposed regulation are detailed below.

Public Process:

Executive Regulation 7-10 was posted for written public comment in the County Register on May 1, 2010. The period for public comment closed on June 1, 2010. Six written comments were received including two from the Restaurant Association of Maryland.

Comments Received During the Comment Period:

Federal Preemption: Three comments were received regarding possible federal preemption, citing the Patient Protection and Affordable Care Act which was signed into law on March 23, 2010. This federal law seeks to establish a national standard for nutrition disclosure in chain restaurants with 20 or more locations. Federal regulations to accompany the law have not been created. According to the County Attorney's Office, the underlying County Resolution and the Executive Regulation are consistent with and not preempted by the new federal law. Possible amendments to the Executive Regulation may be advisable once the federal regulations are adopted.

Postponement of Effective Date or Delayed Enforcement: All comments requested some delay or flexibility with respect to the July 1, 2010 implementation date or

Postponement of Effective Date or Delayed Enforcement: All comments requested some delay or flexibility with respect to the July 1, 2010 implementation date or delayed enforcement due to non-compliance. Reasons for postponement include the brief period of time between the finalization of the regulation and the anticipated enforcement date of July 1, 2010 which would not allow sufficient time for the design and printing of menus and menu boards, and previously scheduled menu and menu-board printing cycles that do not coincide with the implementation date. Restaurants did not want to incur the cost of changing menus and menu boards without the benefit of a final regulation. Additionally, many restaurants have annual or semi-annual printing menu cycles with menu changes scheduled to occur at predetermined dates. One comment, which represented six restaurants locations in Montgomery County, noted that their new menu, which includes nutritional information, is scheduled to come out September 6, 2010. Each location would incur a cost of \$2,500 - \$3,500 to print menus for the July 1, 2010 implementation date, only to reprint new menus at the same cost roughly sixty days later.

The comments made also suggested postponing the implementation date from 60 days to one year after the Executive Regulation is adopted, finalized, and/or printed. Some comments suggested that implementation of the Executive Regulation be stayed until federal regulations are adopted. In the event that the implementation date is not delayed, some comments suggested that the Department of Health and Human Services ("DHHS") establish a period of time where the Executive Regulation is not enforced, and no penalties would be issued for violations of the Executive Regulation.

Expanded Definition of Condiment: One comment requested that the definition of condiment be expanded to include items that are "made available to the customers upon request".

Method for Determining Ranges: Some comments expressed concern that federal regulations have not been determined for items such as combination meals or items differing in flavor or variety. The Executive Regulation stipulates and gives examples of ranges that must be posted. Federal regulations that are adopted may differ by calling for an average, median, or different form of range. Restaurants should be capable of adopting the County regulation and can easily change if federal regulations mandate a different methodology, as long as a reasonable implementation period is permitted.

Required Statements: One comment raised the concern that there is no specific language contained in the Executive Regulation relating to the required statements which must be posted on the menu or menu board. DHHS will provide examples of acceptable language and staff will be trained to recognize acceptable language.

Beverages and Ice: One comment noted the Executive Regulation requires the posting of calories contained in a serving of a beverage without ice, and that in actuality a

serving of a beverage would include ice. It is reasonable to assume that the amount of ice contained in a beverage may vary and therefore cause fluctuations in the actual calories, whereas calories contained in a beverage without ice would be a more consistent reflection of the calories contained in the beverage. The intent of the regulation is to provide the customer with the most useful information, while adopting a standardized approach to nutritional information. Excluding ice from the nutritional calculation will allow the customer to choose the beverage with the desired calories. Furthermore the calculation of calories contained in a beverage without ice is consistent with current nutritional labeling for beverages.

Verifying Accuracy: One comment received stated that while the Director of the Department of Health and Human Services may request an establishment to verify the accuracy of the information provided, there are no parameters for reasonable variation due to methods of preparation, reasonable variation in serving size, formulation of menu items, worker training, variations in ingredients and other factors. The federal Nutrition Labeling and Education Act of 1990 deems food misbranded if the nutritional information is greater than 20% in excess of the actual value for that nutritional information declared on the label (21 C.F.R. 101.9). This permitted variation applies to calories, total fat, saturated fat, cholesterol, sodium, and sugars. The Executive Regulation permits the use of applicable federal law for the calculation of nutritional information.

Beverages Containing Alcohol: One comment received indicated that no federal standard exists for beverages containing alcohol and that restaurants would be unable to comply if these beverages were included in the regulation. In fact the accepted nutritional standard for beer, wine and distilled spirits is the USDA Standard Database. Likewise, other jurisdictions have successfully included alcoholic beverages in their regulations for nutritional labeling. The federal law does not specifically exclude alcoholic beverages.

FDA Rounding Rules: Comments were received requesting that county regulations adopt FDA rounding rules for nutritional labeling. Other jurisdictions have successfully adopted similar regulations.

Flexibility for Determining Nutritional Values: One comment was received requesting flexibility to use any reasonable basis for determining nutritional values, including nutrient databases, laboratory analysis or other reliable verifiable means of analysis. This request is consistent with other jurisdictions enacting nutritional labeling laws.

Items that Bear Complete Nutritional Labeling: One comment suggested exempting menu labeling if the item, as served, already bears complete nutritional labeling, such as a canned soft drink. This suggestion is consistent with other jurisdictions.

the law. Nothing in the Executive Regulation is intended to create a private right of action for civil damages.

Concerns Addressed During Regulation Development

Written comments received included suggestions for improving the regulations and assisting food and drink establishments with compliance. Comments that were adopted are detailed below.

Effective and Enforcement Date: The Executive Regulation will go into effect July 1, 2010. We recommend implementing the law in the following manner: DHHS shall, from July 1, 2010 through July 31, 2010, notify all affected restaurants of the County Resolution, the Executive Regulation, and the need for the affected restaurants to submit implementation plans to the Department of Health and Human Services for review by September 15, 2010. The implementation plans shall include the date certain when the required menus and menu boards will be printed. All affected restaurants shall have the required menus and menu boards in place by no later than January 1, 2010. This implementation schedule will allow restaurants to arrange for printing and/or modifications of menus and menu boards with the benefit of the information contained in the final version of the Executive Regulation, and also allow restaurants with pre-scheduled menu printing cycles to incorporate nutritional labeling without incurring additional expense for out-of-cycle menu publication.

Expanded Definition of Condiment: The definition of condiment was expanded to include items made available to the customer upon request.

Beverages Containing Alcohol: In response to this comment, language including alcoholic beverages and guidelines for calculating nutritional information of alcoholic beverages was added to the Executive Regulation.

FDA Rounding Rules: The Executive Regulation was amended to include rounding guidance consistent with U.S. Food and Drug Administration Center for Food Safety and Applied Nutrition/ Office of Nutrition, Labeling, and Dietary Supplements April 2008, Appendix H: Rounding the Values According to FDA Rounding Rules.

Flexibility for Determining Nutritional Values: The comment requesting flexibility to use any reasonable basis for determining nutritional values, including nutrient databases, laboratory analysis or other reliable verifiable means of analysis, is consistent with other jurisdictions enacting nutritional labeling laws. The Executive Regulation was amended to reflect this suggestion.

Nancy Floreen, President
June 14, 2010
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Items that Bear Complete Nutritional Labeling: Comments suggested exempting items from menu or menu board labeling if the item as served already bears complete nutritional labeling, such as canned soft drinks. This suggestion is consistent with other jurisdictions and the Executive Regulation was amended to reflect this suggestion.

Conclusion:

I firmly believe this Executive Regulation, with the authority granted by Resolution 16-1194 and Bill 19-07, balances the concerns of the various stakeholders involved in the development of this program. We believe that nutritional labeling will provide substantial benefit to the residents of Montgomery County and aid each resident in making informed, healthy choices when dining in our many food and drink establishments. I look forward to your prompt review and approval of this regulation so the County can implement this program. Please contact Clark Beil, in Department of Health and Human Services, Licensure and Regulatory Services at 240-777-3831 or clark.beil@montgomerycountymd.gov to discuss this regulation.

IL: lrr

Attachment



MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

| | |
|--|---------------------------------------|
| Subject REGULATION 15-15A: EATING AND DRINKING ESTABLISHMENTS- NUTRITION LABELING | Number 7-10 |
| Originating Department Department of Health and Human Services | Effective Date July 1, 2010 |

Montgomery County Regulation on:

EATING AND DRINKING ESTABLISHMENTS-NUTRITION LABELING

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Issued by:

The County Executive

Regulation no: 7-10

Authority: County Code §2-65

Supersedes: None

Council Review: Method 2 under Code Section 2A-15

Register Volume 27, Issue 5

Comment Deadline: May 31, 2010

Effective Date: July 1, 2010

Sunset Date: None

SUMMARY: This regulation provides guidance for compliance with and enforcement of Council Bill 19-07 and Board of Health Resolution 16-1194, Board of Health Regulation Requiring Certain Eating and Drinking Establishment to Post Certain Nutrition Information on Menu Boards and Menus. Certain eating and drinking establishments must post the calories of each standardized menu item on the menu or menu board and provide written nutrition information to a consumer upon request. This regulation applies only to chain eating and drinking establishment with 20 or more locations in the United States and does not apply to grocery stores, convenience stores or movie theatres.

ADDRESS: Department of Health and Human Services
Licensure and Regulatory Services
255 Rockville Pike, Suite 100
Rockville, Maryland 20850

STAFF CONTACT: Clark Beil, Senior Administrator, Licensure and Regulatory Services, 240-777-3831

BACKGROUND INFORMATION: County Code §2-65, as amended effective August 10, 2000, provides that the County Council is and may act as, the County Board of Health, and in that capacity may adopt any regulation which a local Board of Health is authorized to adopt under state law. Maryland Code of Health-General Article §3-202(d) authorizes the County Board of Health to adopt rules and regulations regarding any nuisance or cause of disease in the County. On September 18, 2007, the County Council held a public hearing on this regulation. As required by law, each municipality in the County and the public were properly notified of this hearing. The County Council, sitting as the Board of Health, found after hearing the testimony and other evidence in the record of the public hearing that requiring nutrition labeling is necessary to protect the health of patrons of eating and drinking establishments in the County. The Council adopted Bill 19-07 and Resolution 16-1194 on November 17, 2009.

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MONTGOMERY COUNTY EXECUTIVE REGULATION

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Section I: Definitions

Calorie – The energy content of food. The Calories may be expressed to the nearest 5 Calorie increment up to and including 50 Calories and the nearest 10 Calorie increment above 50 Calories.

Calories From Fat – The Caloric content derived from the total fat. The Calories from fat may be expressed to the nearest 5 Calorie increment up to and including 50 Calories and the nearest 10 Calorie increment above 50 Calories.

Chain Eating and Drinking Establishment – An eating and drinking establishment that has at least 20 locations in the United States, is not a grocery store, convenience store, or movie theater, and that:

- a. does business under the same trade name, regardless of the ownership of individual locations; and,
- b. offers substantially the same menu items.

Cholesterol – A sterol or class of solid cyclic alcohol naturally found in animal tissue as expressed in milligrams to the nearest 5 milligram increment.

Clearly and Conspicuously – Of a font type and size such that an average consumer may read the information when standing at the ordering counter or from a menu or food tag. The information must be easily located on the menu, menu board, self service unit, or display case.

Combination Meal – A standardized menu item that is comprised of two or more food items or provides a consumer the option of selecting two or more food items from a menu or menu board.

Condiment – A sauce, sweetener, or seasoning that is not listed on a menu or menu board and is placed on a table or counter for general use or provided to the customer upon request without charge. Condiments include, but are not limited to, individual sugar packets, ketchup, mustard, hot sauce, salt, and pepper.

Convenience Store – A retail business that primarily provides the consumer a convenient location to quickly purchase an item or items from a wide array of products that is not an eating and drinking establishment.



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Director – The Director of the Department of Health and Human Services or designated agents or designee.

Fiber – A non-digestible carbohydrate as expressed in grams.

Food Tag – A label or sign that identifies any food item displayed for sale such as in a display case, salad bar, or buffet.

Eating and Drinking Establishment - Any enterprise that prepares, serves, or sells food or drink for human consumption, on or off the premises, with or without charge. A food service facility includes any restaurant, coffee shop, retail market, cafeteria, short-order café, luncheonette, tavern, sandwich stand, soda fountain, and any food service facility in an industry, institution, hospital, club, school, church, catering kitchen, or camp.

Garnish – A food item that is not a condiment and that is placed on a plate or in a carryout container to adorn the menu item, improve the presentation, or to add flavoring to a menu item (such as a lemon).

Grocery Store – A store primarily engaged in the retail sale of bakery products, canned foods, dry goods, fresh fruits and vegetables, fresh and prepared meats, seafood, and poultry, and nonfood grocery products.

Menu Item – Standardized menu item.

Menu or Menu Board – The primary writing of an eating and drinking establishment from which a consumer makes an order selection. A menu includes a take-out menu, table tent, wine or beverage lists or a placemat. Advertisements (such as coupons or window posters) are not included in the definition.

Point of Ordering – That point at which a consumer orders food or drink from a menu or menu board, or selects a food or drink from a self service unit or display case.

Protein – Complex organic compounds comprised of a chain of amino acids as expressed in grams.

Saturated Fat – The sum of all fatty acids containing no double bonds as expressed in grams.



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Self-Service – Where a consumer has the ability to directly obtain a menu item that is prepackaged or from a salad bar, cafeteria line, buffet, or beverage station without ordering from a menu or a menu board.

Serving or Serving Size – The amount of food customarily consumed per eating occasion by persons 4 years of age or older which is expressed in a common household measure that is appropriate to the food. The serving size must be calculated according to applicable federal law.

Single Menu Item – A food or drink as it is listed on a menu or menu board separate from any other menu item.

Sodium – The amount of sodium chloride as expressed in milligrams to the nearest 5 milligram increment when the menu item contains 5 to 140 milligrams of sodium and to the nearest 10 milligram increment when the menu item contains greater than 140 milligrams.

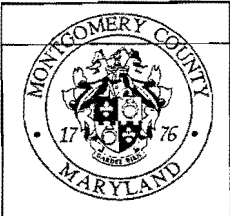
Standardized Menu Item – A food or drink item as usually prepared and offered for sale. A standardized menu item does not include a food or drink item that:

- appears on the menu for less than 60 cumulative days per calendar year;
- is not listed on a menu or menu board, including an item that is placed on a table or counter for general use without charge;
- is a test-market menu item that appears on the menu for less than 90 cumulative days per calendar year; or
- is a daily special.

Sugars – A simple carbohydrate that is the sum of all free mono- and disaccharides as expressed in grams.

Total Carbohydrates – Compounds of carbon, hydrogen, and oxygen as sugars, starches, and fiber. Total carbohydrate content shall be calculated by subtraction of the sum of protein, total fat, moisture, and ash from the total weight of the food and expressed in grams.

Total Fat – The amount of total lipid fatty acids as expressed in grams of triglycerides.



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Section II: Applicability and Exceptions

A. Applicability

Under Chapter 15, Section 15-15A of the Montgomery County Code, 2004, as amended, chain eating and drinking establishments with at least 20 locations in the United States must post the Calories of each standardized menu item on the menu or menu board adjacent to the name of that item and provide additional written nutrition information to a consumer upon request.

B. Exceptions

This regulation does not apply to:

- (1) grocery stores;
- (2) convenience stores;
- (3) movie theaters;
- (4) condiments;
- (5) garnishes; or
- (6) self-serve pre-packaged items whose label already contains complete nutritional labeling.

Section III: Menu Labeling -- General

A. Calorie Labeling. An eating and drinking establishment must post the number of Calories (as "Calories" or other approved descriptive designation), calculated according to applicable federal law:

- (1) Menu and menu board. On all menus and menu boards adjacent to each menu item.
- (2) Self service and display cases: Per serving or per item on a food tag adjacent to each food or drink offered for sale.



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(3) Combination meals or menu items of differing flavors or variety: As a range of the minimum and maximum values of Calories for a menu item if listed as a single menu item and if:

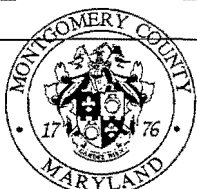
- (a) offered as a combination meal;
- (b) offered in more than one flavor or variety.

B. Required Statements: An eating and drinking establishment must post the following statements on each menu or menu board at the point of ordering and in accordance with Section IV(C) of these regulations:

- (1) A statement regarding the suggested daily Caloric intake as determined by the United States Department of Health and Human Services; and
- (2) A statement regarding the availability in writing and upon request of additional nutrition information as required in Section III(C)

C. Additional Nutrition Information:

- (1) An eating and drinking establishment must make the following nutrition information for each menu item available in writing upon request:
 - (a) Calories;
 - (b) Calories from fat;
 - (c) total fat;
 - (d) saturated fat;
 - (e) cholesterol;
 - (f) sodium;
 - (g) total carbohydrates;
 - (h) sugars;
 - (i) fiber; and
 - (j) protein.



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(2) The additional nutrition information may be calculated according Code of Federal Regulations Titles 9 and 21 and any other applicable federal law, expressed in the increments indicated in Section I and listed with an approved descriptive designation. Nutritional information may also be calculated using nutrient databases, laboratory analysis or other reliable verifiable means of analysis.

(3) The additional nutrition information must be provided per serving or per menu item when obtained from a self service unit or a display case.

(4) The additional nutrition information must be provided as a range of the minimum and maximum values for each menu item if:

- (a) listed as a single menu item and if offered as a combination meal;
- (b) if substitution of one or more ingredients is permitted as so indicated on the menu; or,
- (c) if offered in more than one flavor or variety.

(5) Nutritional value increments may be rounded consistent with U.S. Food and Drug Administration Center for Food Safety and Applied Nutrition/Office of Nutrition, Labeling, and Dietary Supplements April 2008, Appendix H: Rounding the Values According to FDA Rounding Rules.

Section IV: Posting of Information

A. The number or range of Calories must be clearly and conspicuously posted adjacent to each menu item so as to be clearly associated with that menu item. For menu items that are offered in a variety of sizes, the number or range of Calories must be posted for each size offered. For beverages, the number or range of Calories must be posted for a full serving without the addition of ice.

B. The statements required in Section III(B) must be clearly and conspicuously posted on a menu and on a menu board. In the event multiple menu boards are installed in succession, the required statements must be posted on at least one of the menu boards. In the event a menu item is obtained from a self service unit or a display case and the item is not listed on a menu or menu board, the required statements must be posted at the self service unit or display case.



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C. The additional nutrition information must be provided in a form that is clear and conspicuous, clearly associated with the food item, and easily accessible in writing to the consumer.

D. Alcoholic Beverages

- (1) Food and Drink Establishments must provide nutritional labeling of alcoholic beverages listed on a menu or menu board. A separate wine or beverage list is considered a menu or menu board. An approved method for nutrition labeling of alcoholic beverages is to collectively label alcoholic beverages in a clear and prominent position using the average nutritional values for beers, wines and spirits. Nutritional labeling of alcoholic beverages collectively shall otherwise be in accordance with the provisions of these regulations.

Food and Drink Establishments that collectively label alcoholic beverages shall use the following average nutritional values:

- (a) wine – 5 ounces: 122 calories, 4 grams carbohydrate, 7 milligrams sodium;
- (b) regular beer – 12 ounces: 153 calories, 13 grams carbohydrate, 14 milligrams sodium;
- (c) light beer – 12 ounces: 103 calories, 6 grams carbohydrate, 14 milligrams sodium; and
- (d) distilled spirits (80 proof gin, rum, vodka, or whiskey) –1.5 ounces: 96 calories.

Section V: Enforcement

A. When an eating and drinking establishment is inspected by the Director for compliance with Chapter 15 of the Montgomery County Code, 2004, as amended, the Director must verify that the information required in Sections III and IV of this regulation is available and properly posted. The owner, food service manager, or person in charge of an eating and drinking establishment must be given written notice of any violation, including time frames for compliance.



MONTGOMERY COUNTY EXECUTIVE REGULATION

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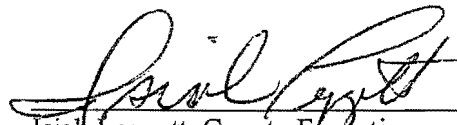
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B. The Director may request an establishment verify the accuracy of the information provided. The verification must be provided to the Director within 30 days of the date requested.

C. The Director must investigate each complaint alleging a violation of this regulation and take appropriate action, including issuing a civil citation, when compliance cannot be otherwise obtained.

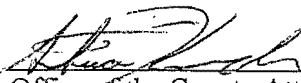
D. Any violation of this regulation is a Class A civil violation. Each day a violation exists shall be considered a separate offense. The Director may suspend a license issued under Chapter 15 for up to three days if the Director finds that an owner has failed to correct all violations within the time frames established or knowingly and repeatedly violated this regulation.

Approved:


Isiah Leggett, County Executive

6/15/10
Date

Approved as to form and legality:


Office of the County Attorney

6/15/2010
Date

MEMORANDUM

June 14, 2010

TO: Joseph F. Beach, Director
Office of Management and Budget

VIA: Beryl Feinberg, ^{B. Feinberg} Management and Budget Manager

VIA: John Cuff, ^{J. Cuff} Management and Budget Specialist

FROM: Pooja Bharadwaja, ^{Pooja Bharadwaja} Management and Budget Specialist

SUBJECT: Executive Regulation 7 -10, Eating and Drinking
Establishments – Nutrition Labeling

REGULATION SUMMARY

These regulations provide guidance for compliance with and enforcement of Council Bill 19-07 and Board of Health Resolution 16-1194, Board of Health Regulation Requiring Certain Eating and Drinking Establishments to Post Certain Nutrition Information on Menu Boards and Menus. Certain eating and drinking establishments must post the calories of each standardized menu item on the menu or menu board and provide written nutrition information to a consumer upon request. The nutrition information must be posted clearly and conspicuously such that an average consumer may read the information at the ordering counter or from a menu or food tag. This regulation applies only to chain eating and drinking establishments with 20 or more locations in the United States and does not apply to grocery stores, convenience stores or movie theatres.

FISCAL SUMMARY

This regulation is expected to have a minimal fiscal impact. During the first implementation year (FY 2011) it is anticipated to add approximately 15 – 30 minutes to each inspection at an effected facility and in all subsequent years. With approximately 150 facilities and additional average inspection time of 22.5 minutes, it is expected to add 56.25 total work hours to the inspection process. These additional work hours will be absorbed without adding additional staff or overtime. However, the total number of mandatory food service inspections completed each year may be reduced due to additional inspection time.

The following contributed to and concurred with this analysis:

Clark Beil, Senior Administrator, Licensure and Regulatory Services, Public Health Service, DHHS
Kevin Chinnia, Environmental Health Director, Licensure and Regulatory Services, DHHS

OMB REVIEW

☒ Fiscal Impact Statement approved


OMB Director

☐ Fiscal Impact Statement not approved, OMB will contact department to remedy.

Beil, Clark

From: Thomas Bartsch [Thomas.Bartsch@ihop.com]

Sent: Wednesday, May 12, 2010 6:14 PM

To: Beil, Clark

Subject: RE: Federal menu labeling

Clark

We only have one menu reprint each year. This year we have a newly designed menu with new food and a new nutrition platform launching in our system on September 6, 2010. The law in Montgomery County goes into effect on July 1, 2010. We have six restaurants in Montgomery County and all are franchised (independently owned and operated). If these franchisees comply on July 1, they will have to reprint all their current menus with calories and a special handout will need to be developed both of which will be obsolete beginning September 6 with our new menu launch. The cost for each restaurant to comply on July 1 will be approximately \$3000. Each restaurant will incur another \$3000 with the new menu launch and handout. Is there any way to allow our restaurants to start on September 6? They'd be able to save \$3000.

Thank you

Tom Bartsch

(818) 637-3614

From: Beil, Clark [mailto:Clark.Beil@montgomerycountymd.gov]

Sent: Monday, April 12, 2010 9:45 AM

To: Thomas Bartsch

Subject: RE: Federal menu labeling

Yes you will still have county regulations to comply with. The county law goes into effect July 1. If you would like any assistance interpreting the law please give us call.

Clark R. Beil

Senior Administrator

Licensure and Regulatory Services

Montgomery County Dept. of Health and Human Services

255 Rockville Pike, 1st Floor

Rockville, Md. 20850

clark.beil@montgomerycountymd.gov

O: 240-777-3831

C: 240-832-6823

F: 240-777-3088

-----Original Message-----

From: Thomas Bartsch [mailto:Thomas.Bartsch@Ihop.com]

Sent: Wednesday, April 07, 2010 4:23 PM

To: Beil, Clark

Subject: RE: Federal menu labeling

Clark

Any word on whether or not we are still going to have to comply with the nutrition labeling in Montgomery County now that the Federal legislation has passed?

Thanks

Thomas 818-637-3614

6/4/2010

16

From: Beil, Clark [mailto:Clark.Beil@montgomerycountymd.gov]
Sent: Tuesday, March 30, 2010 7:48 AM
To: Thomas Bartsch
Subject: Federal menu labeling

Mr. Bartsch, Yes, federal regulation will preempt local laws. We are currently in the process of reviewing local regulations for federal preemption, however, much will depend on the final regulations promulgated by the Secretary. We will be providing effected facilities local regulations and guidance within the next week and will continue to monitor the development and evolution of federal laws. We will make every effort to keep effected restaurants informed of changes as they develop. Please watch our website at www.montgomerycountymd.gov/licensure for updates and please call our office if we can be of assistance. If you wish, we would be happy to review IHOP proposed menu changes and offer suggestions.

Clark R. Beil
 Senior Administrator
 Licensure and Regulatory Services
 Montgomery County Dept. of Health and Human Services
 255 Rockville Pike, 1st Floor
 Rockville, Md. 20850
clark.beil@montgomerycountymd.gov
 O: 240-777-3831
 C: 240-832-6823
 F: 240-777-3088

<<Beil, Clark.vcf>>



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**Census
 2010**

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May 26, 2010

Ms. Uma Ahluwalia, Director
Department of Health and Human Services
401 Hungerford Drive, Fifth Floor
Rockville, Maryland 20850

Re: MCER NO. 7-10 – Proposed Department of Health and Human Services Regulation, Eating and Drinking Establishments Nutrition Labeling

Dear Ms. Ahluwalia:

On behalf of the *Restaurant Association of Maryland*, I am writing to share industry comments regarding the proposed nutrition labeling regulations for eating and drinking establishments.

Generally, our Montgomery County chain restaurant members do not understand why the county insists upon moving forward with adopting regulations and enforcing local law in light of the state/local preemption language contained in the recently-signed federal nutrition labeling law.

As we previously shared with the County Council's legislative staff, part of the federal law specifically amends the national uniformity section of the *Nutrition Labeling and Education Act of 1990 (NLEA)* in the following manner:

Except as provided in subsection (b), no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce – (4) any requirement for nutrition labeling of food that is not identical to the requirement of section 403(q) [21 USCS §343(q)], except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items unless such restaurant or similar retail food establishment complies with the voluntary provision of nutrition information requirements under section 403(q)(5)(H)(ix)

Moreover, the federal law contains language which specifically leaves portions of the law to be determined by the federal Secretary of Health and Human Services (HHS) through regulation. That means that deferring to the Secretary (NOT to local jurisdictions) on these issues is part of the federal law. Given the preemption language, we see no other language in the law expressly permitting local jurisdictions to make their own determination on these issues until such time that a final determination is made by the HHS Secretary.

Has your office sought guidance from the U.S. Food and Drug Administration to determine whether federal law enjoins the county from enforcing certain provisions of local law and regulations?

While Montgomery County maintains that its local nutrition labeling law mirrors federal law, we have identified several issues that prove otherwise.

- In the definition of "*standardized menu item*," Montgomery County's regulation exempts food or drink items that appear on the menu for less than 60 cumulative days per calendar year and test market items that appear on the menu for less than 90 cumulative days per calendar year. The exemption in federal law is simply 60 and 90 days, respectively, per calendar year without any reference to "*cumulative*."
- Menu statements regarding suggested daily caloric intake and the significance of the caloric information in the context of total daily diet will be determined by the HHS Secretary. In this regard, the Montgomery County regulation is not identical to federal law because this section of the law can be determined only by the HHS Secretary. Given the preemption language, we see no other language expressly permitting local jurisdictions to make their own determination on this issue until such time that a final determination is made by the Secretary.
- The federal law provides "*reasonable basis*" liability protection language. The law reads, "*for the purposes of this clause, a restaurant or similar retail food establishment shall have a reasonable basis for its nutrient content disclosures, including nutrient databases, cookbooks, laboratory analyses, and other reasonable means, as described in section 101.10 of title 21, Code of Federal Regulations (or any successor regulation) or in related guidance of the Food and Drug Administration.*" This means that the HHS Secretary will promulgate final regulations in this area as well. Montgomery County's regulation simply says that calories should be "*calculated according to applicable federal law.*"
- In the federal law, "*the Secretary shall establish by regulation standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item, such as soft drinks, ice cream, pizza, doughnuts, or children's combination meals, through means determined by the Secretary, including ranges, averages, or other methods.*" The Montgomery County regulation specifically requires a "*range of calorie content*" for different flavors and varieties. Given the preemption language, we see no other language expressly permitting local jurisdictions to make their own determination on this issue until such time that a final determination is made by the Secretary.

- In the federal law, the HHS Secretary may require the disclosure of additional nutrient information, beyond that mandated by the federal language. We expect the disclosure of trans fat content to be required in the final regulations. According to the language of federal law, *"If the Secretary determines that a nutrient, other than a nutrient required under subclause (ii) (III), should be disclosed for the purpose of providing information to assist consumers in maintaining healthy dietary practices, the Secretary may require, by regulation, disclosure of such nutrient in the written form required under subclause (ii) (III)."* Given the preemption language, we see no other language expressly permitting local jurisdictions to make their own determination on this issue until such time that a final determination is made by the Secretary.
- The federal law reads, *"in promulgating regulations, the Secretary shall consider standardization of recipes and methods of preparation, reasonable variation in serving size and formulation of menu items, space on menus and menu boards, inadvertent human error, training of foodservice workers, variations in ingredients, and other factors, as the Secretary determines; and specify the format and manner of the nutrient content disclosure requirement under this subclause."* Given the preemption language, we see no other language expressly permitting local jurisdictions to make their own determination on this issue until such time that a final determination is made by the Secretary.

With regard to Montgomery County's proposed regulations specifically, we have identified several concerns beyond the issue of federal preemption.

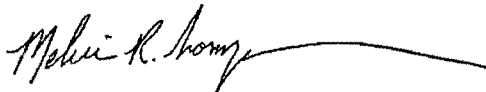
1. In light of the confusion regarding the effect of federal law on Montgomery County's previously-passed law and the late release of proposed regulations for comment, there should be a delay in enforcement or an enforcement phase-in period of at least 60 days to provide restaurants with adequate time to take the necessary steps toward compliance. Most of our chain restaurants in Montgomery County did not move toward complying with the county's impending nutrition labeling requirement because they understood that the local law was preempted by federal law. We are unaware of any notice sent from the local Department of Health and Human Services to chain restaurants informing them that the county intends to continue moving forward with the July 1, 2010 effective date and subsequent enforcement. Moreover, with the comment period on the proposed regulations ending on June 1, 2010, there will be little time for chain restaurants to finalize nutritional analysis information and menu/menu board redesign. Chain restaurants are stuck in limbo until the final regulations are issued, which will not occur until after comments are reviewed and addressed. Even if this process is completed by June 15th, restaurants would have only two weeks to move toward compliance.

2. In Section I: Definitions, the definition of "condiment" is limited to items that are "placed on a table or counter for general use without charge." The definition should be expanded to also include items that are "made available to customers upon request."
3. In Section III: Menu Labeling – General, it is unclear how calories should be calculated for "(3) Combination meals or menu items of differing flavors or variety." We have the same concern regarding Section III C, 4 (the conditions under which additional nutrition information must be provided as a range). While the beginning of Section III requires that calories be "calculated according to applicable federal law," there is currently no federal standard for calculating calories for menu items that come in different flavors, varieties or combinations. As we previously illustrated when discussing the differences between federal/local law, the federal law states that "the Secretary shall establish by regulation standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item, such as soft drinks, ice cream, pizza, doughnuts, or children's combination meals, through means determined by the Secretary, including ranges, averages, or other methods." How should chain restaurants proceed to comply with local law until such time that applicable federal standards exist?
4. In Section III B: Required Statements, for purposes of the regulations, we understand why the county may prefer not to include the specific language here. However, we believe that specific language to comply with this section should be shared in any additional compliance/enforcement information disseminated to restaurants via letter or Department website.
5. In Section IV: Posting of Information, part A requires that "for beverages, the number or range of calories must be posted for a full serving without the addition of ice." We would like to know the justification for this requirement, as we are unaware of any other mandated nutrition labeling jurisdiction that requires such a calculation method for beverages. This would require additional calculations specifically for Montgomery County. Moreover, this requirement in the regulations conflicts with the definition of "standardized menu item" because the standardized serving method is to serve beverages with ice.

6. In Section V: Enforcement, part B states that *"the Director may request an establishment verify the accuracy of the information provided."* However, neither the law nor the proposed regulations provide leeway or parameters for reasonable variations. The reality is that actual caloric values can vary for the same standardized menu item based on a number of factors. For example, the actual calories in a steak can vary daily based on natural variations in the fat content of the slaughtered livestock. A restaurant may also need to temporarily substitute an ingredient based on availability from suppliers or a product recall. As we previously discussed, the federal law provides appropriate recognition of such situations. According to language in the federal law, *"in promulgating regulations, the Secretary shall consider standardization of recipes and methods of preparation, reasonable variation in serving size and formulation of menu items, space on menus and menu boards, inadvertent human error, training of foodservice workers, variations in ingredients, and other factors, as the Secretary determines; and specify the format and manner of the nutrient content disclosure requirement under this subclause."* If the county intends to defer to federal law or the HHS Secretary on this issue, how will this section be enforced in local law until such time that applicable federal standards exist?
7. In Section V: Enforcement, part D authorizes the Director to *"suspend a license issued under Chapter 15 for up to three days if the Director finds that an owner has failed to correct all violations within the time frames established or knowingly and repeatedly violated this regulation."* This is why it is so critically important that the county address our concerns.

We appreciate the opportunity to provide comments. Please do not hesitate to contact me if I can provide additional feedback or clarification.

Sincerely,



Melvin R. Thompson
Senior Vice President
Government Affairs and Public Policy



June 1, 2010

Mr. Clark Beil
Senior Administrator
Department of Health and Human Services,
Licensure and Regulatory Services
255 Rockville Pike, Suite 100
Rockville, Maryland 20850

Via Email: clark.beil@montgomerycountymd.gov

***Re: MCER NO. 7-10 – Proposed Department of Health and Human Services
Regulation, Eating and Drinking Establishments Nutrition Labeling***

Dear Mr. Beil:

On behalf of the *Restaurant Association of Maryland*, I am writing to amend my previously-submitted comments to address the disclosure of calorie information for alcoholic beverages. Because alcohol is not specifically addressed in the law or in the proposed regulations, we were unaware of any intention by the county to enforce calorie disclosure for alcoholic beverages.

This issue raises several questions that will require guidance from the local enforcement authority.

1. According to the law and proposed regulations, calories must be calculated "according to applicable federal law." There is currently no applicable federal law or federal standard for accurately calculating the calorie content of alcoholic beverages. While the recently-signed federal nutrition labeling law does not specifically address alcohol, we expect this issue to be addressed through regulation. Until then, Montgomery County should provide guidance on how to best calculate the calorie content of alcohol if you intend to require such disclosure.
2. Many upscale chain restaurants will not want to send rare and expensive wines and spirits to laboratories for nutritional analysis. Moreover, estimating the calorie content for a standard 10-ounce glass of wine, for example, will not work either because different wines have different levels of residual sugar, which means that caloric content varies. A Port wine, for example, will have more calories than a glass of merlot. A Sauternes will have more calories than a chardonnay. A snifter of Grand Marnier will have more calories than a

Restaurant Association of Maryland
June 1, 2010
Page 2

Scotch whiskey. Accurately calculating the caloric content of mixed drinks can be equally difficult.

3. If Montgomery County intends to require calorie disclosure for alcoholic beverages, many of our chain restaurants that sell alcohol will not be prepared to immediately comply because none of the county's previously-released public information on this issue mentions any requirement for calorie disclosure for alcoholic beverages.

If restaurants are ultimately required to disclose calorie information for alcohol, we would like to work with you closely on additional regulations addressing this issue.

Thank you for your time and consideration. If I can provide additional comments or feedback, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, reading "Melvin R. Thompson", followed by a long horizontal flourish line.

Melvin R. Thompson
Senior Vice President
Government Affairs and Public Policy

Beil, Clark

From: Melvin Thompson [mthompson@marylandrestaurants.com]
Sent: Tuesday, June 01, 2010 4:54 PM
To: Beil, Clark
Cc: Mallet, Kathleen; Kesa Bruce; Amanda Rieter
Subject: Restaurant Association of MD - Proposed Nutrition Labeling Regulations - ADDITIONAL COMMENTS on CALORIE DISCLOSURE for ALCOHOLIC BEVERAGES

Please see additional comments on calorie disclosure for alcoholic beverages attached.

Melvin R. Thompson | Senior Vice President
Government Affairs and Public Policy
Restaurant Association of Maryland
6301 Hillside Court | Columbia, MD 21046
410-290-6800 x1007 | 443-463-7349 Cell | mthompson@marylandrestaurants.com

Membership Matters! Did you know that the Restaurant Association of Maryland worked with lawmakers in Annapolis this year to ensure restaurants were exempt from a new mandatory shift break law and preserve the right of restaurants to charge an automatic gratuity? Membership dues give your business a voice and help the Association protect the industry on the state and local levels.

Confidentiality note:

This electronic message transmission contains information from the Restaurant Association of Maryland that may be confidential or privileged. The information is intended to be for the use of the individual or entity named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

6/4/2010

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7-4161

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May 28, 2010

VIA E-MAIL (CLARK.BEIL@MONTGOMERYCOUNTYMD.GOV)
AND REGULAR MAIL

Clark R. Beil
Senior Administrator
Licensure and Regulatory Services
Montgomery County Department of
Health and Human Services
255 Rockville Pike, 1st Floor
Rockville, Maryland 20850

Re: Bill 19-07
Comments Regarding Draft Regulations

Dear Mr. Beil:

I represent Bertucci's, a national restaurant concern, which has one restaurant in Montgomery County, Maryland, located at 11301 Rockville Pike, Bethesda, Maryland 20895.

Because Bertucci's operates more than 90 restaurants in ten states and the District of Columbia, it is subject to the reach of Bill 19-07. I understand that the County is now receiving public comment regarding its draft regulations relating to Bill 19-07 and is accepting comments through May 31, 2010. On behalf of Bertucci's, please accept this letter as its comments.

As I am certain you are aware, on March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act into law. This law will establish a single, consistent national standard for nutrition disclosure in restaurants. Bertucci's embraces the new federal law and is diligently working in advance of the federal law's date of implementation, to ensure compliance with it. Since Bertucci's operates in ten states and in the District of Columbia, a

Clark R. Beil
Senior Administrator
Page 2
May 28, 2010

uniform federal law will permit Bertucci's to deliver nutrition information to its customers in compliance with a single, consistent national standard for such disclosure.

Bertucci's immediate concern with the proposed July 1, 2010 date of implementation of Montgomery County's Bill 19-07 is that the cost of implementation, including the cost of preparing menus for one restaurant different than the other 90 plus restaurants in Bertucci's operation, will require significant outlay of manpower and expense and stray from Bertucci's goal of consistency.

Bertucci's believes that Montgomery County should stay its implementation of Bill 19-07 so as to permit the new federal law to become effective. Certainly, it is patent that the federal law will preempt all local and state laws which previously addressed these nutrition issues.

As an alternative to Montgomery County fully staying enforcement, Bertucci's suggests that any regulations, which are implemented and become effective July 1, 2010, not be enforced during the time federal regulations are drafted and until the federal law is implemented. At a minimum, Bertucci's urges that the Council ensure that Class A penalties are not imposed upon restaurants deemed to violate Bill 19-07 during the time until the federal law is implemented.

As a further alternative, Bertucci's suggests that instead of national restaurants being required to create menus and incur other expenses which would impact only Montgomery County, until the new federal law is implemented, that the Montgomery County law require only notice at the restaurant that nutrition information is posted on a nutrition website.

Finally, if none of these above-listed alternatives are embraced by the County, Bertucci's requests that the County not make Bill 19-07 effective on July 1, 2010, but, instead, afford a one year grace period for the necessary nutrition-related information to be gathered and disclosed on separate menus prepared only for the single Bertucci's restaurant in Bethesda, Montgomery County, Maryland.

Bertucci's is proud and pleased to be part of the Montgomery restaurant community. Should Bertucci's not be able to deliver nutrition information on revised menus by July 1, 2010, it should not be at risk of being subject to the \$500.00 per day (or more) penalty established for Class A violations in Section 1-19 of the Montgomery County Code.

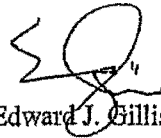
Thank you for your consideration of these comments and Bertucci's hopes to learn that Montgomery County will stay enforcement of Bill 19-07, so as to allow the new federal nutrition

ROYSTON, MUELLER, McLEAN & REID, LLP

Clark R. Beil
Senior Administrator
Page 3
May 28, 2010

disclosure law to be implemented and ensure a consistent national standard, a result which will benefit all consumers, not only those in Montgomery County, Maryland.

Very truly yours,



Edward J. Gilliss

EJG/ges

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May 24, 2010

RECEIVED MAY 27 2010

Ms. Uma Ahluwalia
Director
Department of Health and Human Services
401 Hungerford Drive
Fifth Floor
Rockville, MD 20850

Dear Ms. Ahluwalia:

I am writing in response to your request for public comment on the recent regulation by the Board of Health of Montgomery County requiring certain eating and drinking establishments to post certain nutrition information on menu boards and menus, adopted November 17, 2009. It is my understanding that comments are being accepted until June 1, 2010, that the Board of Health expects to issue a final regulation some time during the month of June and that the final regulation is to take effect July 1, 2010.

Noodles & Company operates and franchises fast casual restaurants that sell a wide variety of globally inspired noodle dishes, along with soups, salads and sandwiches. Our menu is designed to appeal to a wide variety of consumer tastes, so we offer dishes from Asian, Mediterranean and American cuisines, and these dishes range from healthy to indulgent. We believe that many of our guests are attracted to our restaurants because they offer many healthy choices. For example, 16 of our dishes contain 400 calories or less, and ten of our dishes have eleven grams of fat or less. Health magazine has named Noodles & Company one of America's healthiest fast food restaurants. In addition, we believe our guests are attracted to our food because every dish we offer is made to order and can be customized to the guest's liking. We offer small and regular bowl sizes, a selection of fourteen fresh vegetables which can be added, subtracted or substituted in any dish, and several proteins including beef, chicken, meatballs and sautéed shrimp. In addition, whole grain linguine can be substituted in any dish. Accordingly, the precise nutritional content of any dish can vary widely based upon the guest's individual choice.

Complete nutritional information regarding our menu offerings is available upon request in each of our restaurants and online at noodles.com. We also offer a diagrammatic representation of the calories included in various alternative combinations of each of our cuisines, online at noodles.com and in our restaurants. I have included for your information copies of our existing menus, our nutritional information available in our restaurants and the diagrams illustrating caloric values of various combinations of our Asian, Mediterranean and American dishes.

Noodles & Company currently operates 192 restaurants in fourteen states and our franchisees operate 43 restaurants in four of those states and three other states. Neither we nor our franchisees have yet become subject to menu labeling laws or regulations. We do not do business in New York, San Francisco or Seattle, and we have fewer than 20

restaurants in California. We have four restaurants in Portland, Oregon, where Multnomah County had adopted a menu labeling law, but that law was pre-empted by legislation enacted by the State of Oregon. The Oregon law requires labeling on menu boards effective January 1, 2011; the availability of printed nutritional information at the restaurant is already required under Oregon law but there will be no authority to enforce that requirement until January 1, 2011. We operate five restaurants in Montgomery County.

The federal Patient Protection and Affordable Care Act, which was passed by Congress and signed into law in February of this year, for the first time establishes a federal menu labeling requirement, which will be effectuated by FDA regulations to be proposed within one year of the enactment of the law.

We are writing to comment on Montgomery County's regulatory effort, particularly in light of the enactment of new federal legislation in this area.

Federal Pre-emption

While we question whether disclosure of calorie content of menu items on menu boards is the most effective way of communicating nutritional information that will be useful to consumers, there seems to us little doubt that a patchwork of state and local laws which may vary widely in their requirements is inferior to a single uniform law governing nutrition labeling in restaurants, at least for large multi-unit restaurant businesses that operate in many jurisdictions. The layout and design of various formats of menus and menu boards, the fabrication and printing of multiple versions of the same, and the monitoring of numerous state and local laws, all impose significant costs upon such businesses. These costs come at a time when such businesses are under significant stress due to a prolonged decline in consumer discretionary spending, and when added to other growing costs of regulatory compliance, such as paid sick leave and growing entitlements to employer-provided health care, they will contribute to either increased menu prices or operating losses and potential business failure for restaurants operating close to the margin of profitability, or both. Accordingly, we were pleased to see Congress enact a law that will be applicable nationwide and that will take effect only after an FDA rulemaking process which will permit affected parties to have reasonable input as regulations are crafted and a reasonable period of time after the final rules become known to come into compliance.

It was surprising to us that Montgomery County apparently intends to proceed to put in place its own regulatory regime pending regulatory action by the FDA under the new federal law. We understand that Montgomery County apparently views the Montgomery County regulation as "identical" to the new federal law. We have difficulty understanding how this can be so. Take for example the requirement of the Montgomery County regulation that a restaurant that offers a standardized menu item in more than one flavor or variety and lists the item as a single menu item, must post a range showing the minimum and maximum number of calories from that item. Putting aside the interpretive questions that may arise from this rule (e.g., are the proteins we offer with each noodle dish each a separate variety of that dish, so that we would show a range of calories for a dish with a

minimum (small size, no protein,) to a maximum (large size, highest caloric protein we offer, most extra veggies we offer)?), it is not clear that federal law will require the same convention for the presentation of this information. Indeed, the federal law expressly reserves the handling of such matters of menu variability and combination meals to regulations. One could imagine such regulations requiring or permitting the separate identification of caloric values of each component of a dish that can be assembled in various ways by the consumer (akin to the diagrammatic presentation we offer of combined calories from different combinations of our dishes and their constituent proteins).

Given that the federal law will govern in this area and will take concrete form in regulations to be adopted in the relatively near future, we think the more prudent course for Montgomery County would be to withdraw from the field now, as no law has yet been implemented, and defer to the federal regulatory regime.

Indeed, we believe the Montgomery County law is in fact pre-empted by the federal law and that Montgomery County should acknowledge as much.

Effectiveness of Montgomery County Regulation

In the event Montgomery County determines to proceed with adoption of a final regulation and enforcement of that regulation notwithstanding compelling legal and prudential arguments to do otherwise, we would like to comment on its process for adopting a final rule.

We think the restaurants operating in Montgomery County and potentially subject to its rulemaking will best be served by the maximum degree of process transparency and notice. Accordingly, we think the County, or absent formal action, the commissioners who will be leading the effort to finalize a regulation, should clearly communicate as soon as possible a reasonable timetable for the effectiveness, or at least the earliest enforcement, of the rule. We would propose they make an immediate announcement to the effect that the final rule will not take effect for a period of at least 60 days from the date it becomes final and is published, or at least that no enforcement would occur, or penalties be assessed, during that time period. This would permit restaurant businesses who are inclined to comply with the rule an opportunity to wait to fabricate final menu boards and print menus until they had a reasonable opportunity to take into account the terms of the final regulations.

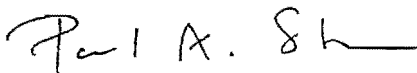
Content of Regulation

Finally, while we are hopeful that the County will reconsider its decision to proceed with menu labeling regulation; we would propose that any rulemaking effort in this area take into consideration a number of questions and issues (and we intend to comment appropriately on the FDA regulations, when they are proposed, urging the FDA to take these questions and issues into account). These include the following:

1. As noted above, the possibility of variations in menu items and multiple combinations of menu items raises various issues. We would urge that final regulations allow the restaurant owner flexibility in determining whether to show calories in ranges, from minimum to maximum, or to provide nutritional values for each component so that a consumer can readily ascertain the nutritional value of a particular combination. It may well be that providing this information (i.e., as shown in the nutrition information disclosures) in a separate display area rather than on menu boards will provide more useful information to consumers.
2. The final regulation should explicitly permit the use of rounding rules applicable under existing FDA guidelines. See A Food Labeling Guide (U.S. Food and Drug Administration Center for Food Safety and Applied Nutrition/Office of Nutrition, labeling and Dietary Supplements April 2008), Appendix H: Rounding the Values According to FDA Rounding Rules.
3. The final rule should give restaurants flexibility to use any reasonable basis for determining nutritional values, including nutrient databases, laboratory analysis or other reliable and verifiable means of analysis.
4. We would propose that any products that bear complete nutrition labeling (e.g., beverages in a reach-in cooler, or dessert items such as cookies) need not be accompanied by any nutritional labeling when they appear on menus or menu boards.
5. It would be helpful to include a safe harbor or other more specific guidance for compliance with the clear and conspicuous requirement, so as to avoid uneven or subjective enforcement.
6. We think the final regulation should include an express statement that it does not confer a private right of action arising out of violations of the law.

We appreciate the opportunity to comment on this important matter of public policy and would be happy to discuss any of our comments at your convenience. I can be contacted at pstrasen@noodles.com or 720 214 1921.

Very truly yours,



Paul A. Strasen
Executive Vice President & General Counsel
Noodles & Company

cc: Silvia Kinch
Amanda Mihill
Clark Bell

Beil, Clark

From: Thomas Bartsch [Thomas.Bartsch@ihop.com]
Sent: Thursday, May 13, 2010 1:06 PM
To: Ahluwalia, Uma
Cc: Beil, Clark
Subject: Montgomery County Menu Labeling
Uma

I received your contact information from Clark Beil. As an introduction, I am the Brand Marketing Director at IHOP. One of the platforms I cover at IHOP is nutrition and the overall nutrition strategy.

We have 6 IHOP restaurants located in Montgomery County, MD. These IHOP restaurants are all franchised and independently owned and operated. They are really just small, entrepreneurial business owners under the IHOP name.

As the Brand Director, I am representing these franchisees and requesting a delay in the compliance for the Montgomery County nutrition labeling. Your legislation begins July 1, 2010. On September 6, 2010 we have a newly designed menu with new food and a new nutrition platform launching in our system. If these franchisees are forced to comply on July 1, they will have to reprint all their current menus with calories and a special handout will need to be developed, both of which will be obsolete beginning September 6 with our new menu launch. The cost for each restaurant to comply on July 1 will be approximately \$2500 - \$3500. Each restaurant will incur another \$2500 - \$3500 with the new menu launch and handout on September 6. Saving these independently owned and operated franchisees \$2500 - \$3500 would really help them in this tough and challenging economic environment.

If a delay until September 6, 2010 is possible, we would need to know quickly. It takes 7 weeks to develop special menus and special handouts. Once we start the process, the franchisees will incur costs.

I appreciate and the franchisees will really appreciate anything you can do.

Thank you,
Tom Bartsch
Brand Marketing Director
IHOP
(818) 637-3614

6/4/2010

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Beil, Clark

From: Langendorf, George [George.Langendorf@APORTER.COM]
Sent: Monday, May 24, 2010 6:52 PM
To: Beil, Clark
Subject: RE: proposed regulation re menu labeling law

Clark,

No problem at all - thank you for sending the draft regulation.

Our most pressing question is whether there is likely to be any flexibility on timing. Many restaurants have menu cycles that update only every six months or so, and my clients are wondering whether it will be acceptable to update on the next menu cycle to comply with the Montgomery law, i.e. on a date shortly after July 1, 2010. The law / regulation does not appear to contemplate this, but we are wondering if there is any chance the County would commit to refrain from citing a restaurant that can give it a definite date for compliance (e.g. the next menu cycle), or whether there is any chance the July 1 date might slip at all, or whether (as a practical matter) the County plans to allow restaurants a couple of months to get into compliance before it starts enforcing the law.

Could you give me your thoughts on this issue? Our clients fully intend to comply with the Montgomery County law (particularly because the law's requirements track the newly passed federal law), and so they are just looking for some accommodation on timing, not on substance. If you would like to discuss, please give me a call at 415-356-3005. (I would have called you today, but I am on the West Coast and I imagine by now you are done for the day.)

Thanks very much,

George

George Langendorf
Arnold & Porter LLP
1 Embarcadero Center, 22nd Floor
San Francisco, CA 94111

Telephone: 415-356-3005
george.langendorf@aporter.com
www.arnoldporter.com

From: Beil, Clark [mailto:Clark.Beil@montgomerycountymd.gov]
Sent: Friday, May 21, 2010 9:32 AM
To: Langendorf, George
Subject: RE: proposed regulation re menu labeling law

Sorry it took me awhile to get back to you. Here are the draft regulations and please call me directly if you have any questions.

6/4/2010

(34)

Clark R. Beil
Senior Administrator
Licensure and Regulatory Services
Montgomery County Dept. of Health and Human Services
255 Rockville Pike, 1st Floor
Rockville, Md. 20850
clark.beil@montgomerycountymd.gov
O: 240-777-3831
C: 240-832-6823
F: 240-777-3088

-----Original Message-----

From: Langendorf, George [mailto:George.Langendorf@APORTER.COM]
Sent: Wednesday, May 19, 2010 5:00 PM
To: Beil, Clark
Subject: proposed regulation re menu labeling law

Hi Clark,

Could you send me a copy of the proposed regulation implementing the Montgomery County Menu Labeling Law? (Bill No. 19-01). We represent a number of affected chain restaurants, and are thus interested in the guidance. (If you have an electronic copy that would be ideal) Thanks!

George

Ps. Also, would you happen to know who I should call over there with questions about compliance with the law? If you could point me in the right direction I would very much appreciate it.

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Resolution No. _____
Introduced: _____
Adopted: _____

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY MARYLAND**

By: County Council

SUBJECT: Approval of Executive Regulation 7-10, Eating and Drinking Establishments – Nutrition Labeling

Background

1. Executive Regulation 7-10 would implement Council Resolution 16-1194 and Bill 19-07, codified at §15-15A, Eating and Drinking Establishments – Nutrition Labeling. Resolution 16-1194 and Bill 19-07 require that calories and other nutritional information be provided at restaurant chains with 20 or more locations nationwide.
2. On June 15, 2010, the County Council received Executive Regulation 7-10, Eating and Drinking Establishments – Nutrition Labeling.
3. Under Method (2), if the Council does not approve or disapprove a regulation within 60 days after the Council receives the regulation, it is automatically approved and takes effect the day after the deadline for approval or a later date specified in the regulation.
4. The Health and Human Services Committee reviewed Executive Regulation 7-10 and recommended {*approval/denial/approval with amendments*}.

Action

The County Council for Montgomery County Maryland approves the following resolution:

Executive Regulation 7-10, Eating and Drinking Establishments – Nutritional Labeling is {*approved/denied/approved with amendments*}.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council